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REASONABLENESS IN ADMINISTRATIVE
LAW:
A COMPARATIVE REFLECTION ON
FUNCTIONAL EQUIVALENCE

Michal Bobek

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Editor in Chief
Jan Komarek
Jan.Komarek@some.oxon.org

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Abstract

The paper offers a concise functional comparison of the use of reasonableness in the area of judicial review of administrative discretion in the English (or more broadly the common law), German, Czech and the French law. This comparison allows us to conclude that the fact that there are no self standing tests of “reasonableness” in the judicial review of administrative discretion either in Czech, German or French law, does not mean that in these legal systems, the judicial control of administrative discretion would be “less reasonable”. It is only that functionally similar results, i. e. the review of administrative discretion, are, for historical purposes, achieved by different means and labelled differently, most commonly by the categories of legality, the (absence) of misuse of powers and proportionality.

Keywords

Administrative law, comparison, administrative justice, judicial review of administrative discretion, reasonableness, proportionality

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Reasonableness in Administrative Law:

A comparative reflection on functional equivalence

Michal Bobek*

To a Czech, or perhaps more broadly to a Civilian lawyer, the number of references to the notion of reasonableness in the Anglo-American legal tradition appears somewhat singular. In a number of areas, various “reasonableness” tests have been developed: standards like that one of a “reasonable man”, “reasonable notice”, “reasonable use”, “reasonable force”, “reasonable expectation”, “reasonable care” etc. There is also the standard for action of a “reasonable administrative authority”, which forms the jurisdictional test for the review of administrative action.

The perhaps premature conclusion from this reasonableness spree, which has only very limited parallel in say Czech, German or French law, might be that the English or other English-speaking people are indeed very reasonable. However, while having no ambition to utter an opinion on this question, a different exercise is effectuated in this short piece: a functional comparison of the use of reasonableness in the area of judicial review of administrative discretion. This comparison allows us to conclude that the fact that there are no self standing tests of “reasonableness” in the judicial review of administrative discretion either in Czech, German or French law, does not mean that in these legal systems, the judicial control of administrative discretion would be “less reasonable”. It is only that functionally similar results, i. e. the review of administrative discretion, are, for historical purposes, achieved by different means and labelled differently.

I. REASONABLENESS IN ADMINISTRATIVE LAW

There are at least three areas in which the yardstick of reasonableness might play a role in administrative law.

I. 1. Reasonableness as Legitimacy

On a deeper philosophical plane, reasonableness of the law or a particular statute in the area of public administration is, as in other areas of law, a legitimising argument. A reasonable law has fewer problems in securing its general acceptance and obedience; “*Law is the perfection of reason*”.¹ In the area of administrative law, practising legal philosophers tend to come in limited supply; public administration generally does not have a strong reputation for questioning law and administrative regulations or circulars in terms of their reasonableness. Reflections on reasonableness as legitimacy thus remain floating in the space and are often left to rather constitutional than administrative deliberations.

I. 2. Reasonableness in Statutory Interpretation

All rules of statutory interpretation are about arriving at a “reasonable” reading of a statute. There are, however, perhaps two instances in which the category of reasonableness surfaces

* European University Institute, Department of Law and Supreme Administrative Court of the Czech Republic. I am much obliged to David Kosář, Petr Bříza and Jacques Ziller for their comments on the draft of this paper. This paper is forthcoming in Bongiovanni, G., Sartor, G., Valentini, C. (eds.) Reasonableness and Law (Springer, 2008). All opinions expressed are strictly personal to the author. Contact: Michal.Bobek@eui.eu.

¹ Hon. Le Baron B. Colt, *Law and Reasonableness*. 37 Am. L. Rev. 657 (1903), p. 657.

more strongly than in others: the avoidance of unreasonable (absurd) results and contextual reasoning.

A generally shared principle going well beyond the English rules² of constructing statutes is the rule against absurdity, i.e. the presumption of a reasonable legislator, who did not wish to achieve absurd results. This approach is a kind of “*consequentialist*” reasoning, i.e. the reasoning out of a negative consequence one does not wish to enter. In the more modern continental guise, the call for accepting reasonableness in the statutory interpretation was connected with the struggle against the distended legal formalism. In this context, G. Calabresi³ mentions the famous example of the medieval Italian law against shedding blood in the streets of Bologna. The object of the law was to ban duelling and fights in the streets. However, the question which later arose was whether or not the same prohibition, which was in itself clear and unconditional, applies also in the case of a doctor who, wanting to help a man who was sick and collapsed in the street, bled him, thus shedding blood in the street. Similar example⁴ would be the provision of a statute by Edward II., who decreed that every prisoner who breaks the prison shall be guilty of felony and hanged. Does this, again a very categorical statement, apply also to prisoners who break out because the prison is on fire?

Today, the reasonableness argument, contained in the avoidance of absurd results rule, has been largely superseded by purposive (teleological) reasoning. Purposive reasoning *per se* is just a consequentialist argument, which does not say much about the reasonableness of the consequence itself. However, there appears to be an implicit evaluative stage of the quality of purpose itself; one does not normally advocate achieving absurd results. The advantage of purposive approach instead of just an argument out of an unreasonable consequence is that the reasoning can openly argue out of a negative as well as positive consequence.⁵

Reasonableness plays an additional role in the area of contextual reasoning. It may serve as a codename for an emerging or already emerged societal consensus, which allows for interpretation “updates” of existing laws. Lord Devlin once made, in this respect, the distinction between “activist” and “dynamic” lawmaking.⁶ The key is the consensus: *activist* lawmaking means taking up an already emerged and consensus-driven idea and turning it into law. *Dynamic* lawmaking means taking up an idea created outside the consensus, i.e. one not (yet) supported by the society as a whole, turning it into law and then propagating it. Devlin admits that there are instances, in which judges should be activist. But they should never be dynamic.⁷ In both instances, however, the word „reasonable“ tends to be often used. The typical argument of this type would argue that it is no longer reasonable, in view of the

² Cf. the classical account in Cross, R., Bell, J., Engle, G. STATUTORY INTERPRETATION. 3rd Ed. London: Butterworths, 1995.

³ See Calabresi, G. *The Functions of Formalism: In Memory of Guido Tedeschi*. 67 U. Chi. L. Rev. 479 (2000), p. 481. The origin of the example itself is attributed to S. von Puffendorf.

⁴ Hon. Le Baron B. Colt, cit. above, n. 1, p. 670.

⁵ The style of reasoning employed by the Court of Justice of the European Communities provides ample examples of both. For the reasoning out of positive consequence see e.g. Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECR English special edition, p.1 („*The Community is a new legal order of international and it thus must have the following characteristics.*“), for the example of reasoning out of a negative consequence, see e.g. Case C-453/99, *Courage Ltd and Others v Bernard Crehan* [2001] ECR I-6297 („*If we do not allow for damages for private breaches of Community competition rules, the effective enforcement of EC competition rules on the national level will be compromised*“).

⁶ Lord Devlin, *Judges and Lawmakers*. (1976) 39 Modern L. R. 1.

⁷ *Ibid.*, a p. 5. In Devlin’s eyes, dynamic lawmaking needs enthusiasm. As he adds, „*Enthusiasm is not and cannot be a judicial virtue. It means taking sides [...]*“

changing habits, moods and fashion in the society or even abroad, to interpret (any longer) the law X in the manner Y.

I. 3. Reasonableness in the Judicial Review

The most intriguing use of the notion of reasonableness, which will be examined in this contribution, is the use of “reasonableness” as the standard for judicial review of administrative decisions. The use of reasonableness in this context essentially means that if the action of an administrative authority is deemed not to be reasonable, it can be annulled.

II. REASONABLENESS IN JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION

There is a difference in the use of concept of reasonableness in, on the one hand, the Anglo-American common law and, on the other hand, in, for instance, the Czech, German or French legal systems. The first former system uses the reasonableness standard as a sort of “enforceable” law, the latter ones do not mention it but rarely. If they do, “reason” or “reasonableness” tend to be used as a judicial argument of last resort or an ancillary argument. Let us first examine the various contexts in which the standard of “reasonableness” appears in the various common law systems.

II. 1. The Many Faces of Reason: England, Australia, Canada and the United States

In England, “reasonableness” as the criterion for judicial review of administrative action is mostly associated with the so-called “Wednesbury reasonableness test”. The case,⁸ which gave the name to the test itself, arose out of a dispute which opposed a local authority and a picture theatre. The authority has granted a licence to the theatre for cinematographic performances, with one condition attached thereto: no children under 15 years of age shall be admitted to any entertainment on Sunday, whether accompanied by an adult or not. In attaching the condition to the licence, the authority was within the sphere of free discretion assigned to it by the s. 1 sub-s. 1 of the Sunday Entertainments Act 1932, which simply provided that the licensing authority may make the use of the licence “*subject to such conditions as the authority thinks fit to impose*”.

When reviewing and eventually dismissing the action for judicial review, Lord Greene, M.R. stated, that the courts will not interfere with the discretion assigned to public authorities, provided that

- (i) the authority took into account all the things it ought to have taken into account,
- (ii) the authority did not take into account things they should not take into account (improper purposes) and
- (iii) the decision is not unreasonable, i.e. it is not a decision that no reasonable authority could ever have come to.⁹

The doctrine¹⁰ generally interpreted the notion of reasonableness contained in this decision as having a twofold meaning: firstly, the reasonableness in narrow (or substantive) sense, which corresponds to the third prong of the above described test: no reasonable authority would have adopted such a decision. Secondly, reasonableness in the broader (or umbrella) sense, which contains the entire test and all the three prongs: a reasonable authority will not only adopt a

⁸ *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K. B. 223.

⁹ *Ibid.*, p. 233 and 234.

¹⁰ Craig, P. ADMINISTRATIVE LAW. 5th Ed. London: Sweet & Maxwell, 2003, p 553; Delany, H. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION – A COMPARATIVE ANALYSIS. Dublin: Round Hall Sweet & Maxwell, 2001, p. 70; Künnecke, M. TRADITION AND CHANGE IN ADMINISTRATIVE LAW – AN ANGLO-GERMAN COMPARISON. Berlin – Heidelberg – New York: Springer, 2007, p. 93.

substantively reasonable decision, it will also take into consideration all the things it should take into account and not take any of those it ought not.

It should, however, be stressed that in the English law, reasonableness as the yardstick for the exercise of administrative discretion does not start with *Wednesbury*. Quite to the contrary: not only has reasonableness been the yardstick for the administrative review before the WWII,¹¹ it goes back to the 17th century and even before. An excellent overview of the reasonableness review of delegated legislation, adopted by the administrative authorities, provides A. Wharan.¹² He gives examples of courts striking down local regulation banning the play of musical instruments in the streets on Sundays,¹³ or the prohibition to bury corpse in any existing cemetery within the distance of one hundred yards from any public building¹⁴ etc.

The reasonableness test in administrative review was “successfully” exported from England to the countries of the British Commonwealth. In Australia, the reasonableness standard has been incorporated directly into the text of the Administrative Decisions (Judicial Review) Act 1977 as one of the demonstration of improper exercise of administrative power.¹⁵

The test of reasonableness for the review of administrative action is also accepted in Canada.¹⁶ An elucidating summary of this principle in Canadian federal law was given by Justice L’Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration)*¹⁷: “Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of the decisions-makers, the exercise of discretion from an improper purpose, and the use of irrelevant considerations [...citations, including *Wednesbury*, omitted...] In my opinion, these doctrines incorporate two central ideas – that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute [...] However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature [...]”¹⁸

The honourable justice highlights two general aspects of the use of the standard of reasonableness in reviewing administrative discretion: firstly, whether the authority is within its sphere of competence, i.e. whether it has the power to act and, secondly, once found that it indeed has the power, in what way does it exercise the given power. Both of these aspects may be covered by the judicial review of reasonableness.

¹¹ Famously e.g. *Roberts v. Hopwood* [1925] A. C. 578, where at p. 613 Lord Wrenbury observed: „A person to whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower to do what he likes [...] He must by the use of his reason ascertain and follow the course which reason directs.“

¹² *Judicial Control of Delegated Legislation* 36 Mod. L. Rev. 615 (1973)

¹³ *Johnson v. Croydon Corporation* 16 Q. B. D. 708 (1886)

¹⁴ *Slattery v. Naylor* 13 App. Cas. 446 (1888)

¹⁵ S. 5 sub-s. 2 (g) and s. 6 sub-s. 2 (g) which gives demonstrative listing as to when the exercise of public power in adopting a decision (section 5) or in the conduct related to making the decision (section 6) will be improper: „exercise of a power that is so unreasonable that no reasonable person could have exercised the power“.

¹⁶ See, e.g., Sossin, L. *An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law*. 27 Queen’s L. J. 809 (2001 – 2002); Grey, J. H., Casgrain, L.-M. *Jurisdiction, Fairness and Reasonableness* 10 Dalhousie L. J. 89 (1986 – 1987).

¹⁷ [1999] 2 S. C. R. 817

¹⁸ *Ibid.*, p. 853. See also *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] S. C. R. 748.

The federal law of the United States recognises a number of reasonableness tests.¹⁹ Only a passing remark will be made on the use of reasonableness in the context of the fourth amendment to the U. S. Constitution. The Fourth Amendment protects the individual, *inter alia*, against “warrantless searches and seizures”²⁰. When is a search or seizure warrantless is to be considered under a two-part test, which was suggested by Justice Harlan in *Katz v. United States*:²¹ “[...] there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation of privacy be one that society is prepared to recognise as “reasonable”²². It is interesting to note that in such context, the reasonableness criteria is used not only to state how can discretion be exercised, but also in order to ascertain the existence of the power to search and seizure of the federal authorities.

II. 2. *Intermezzo: the Functions of the Reasonableness Standards*

What may one understand as being the function of the use of reasonableness in the above sketched English common law and its offspring? Arguably, the broader perception of the reasonableness standard is twofold. Firstly, it is about limiting the exercise of administrative discretion, i.e. somehow mapping the legal space in which the criteria, according to which the public authority is supposed to decide, are not clearly laid down in the empowering law itself. The Canadian and U. S. examples provide, however, an even broader understanding of reasonableness: it may not be only about the mode in which existing competence is exercised. It may also be about the existence of the competence itself.

If the broader understanding of “reasonableness” is accepted, then its function in administrative and constitutional review can be said to be twofold:

- (i) It demarcates the scope of the competence of a public authority (“Can they do it at all?”);
- (ii) If the authority is competent, in what way can it exercise the discretion assigned to it within the existing competence (“How can they do it?”).

II. 3. *The Austrian-Germanic and the French Traditions*

When looking into the German, Czech or French case law of administrative courts or the standard doctrinal commentaries, one would be quite struck by the absence of the word reasonableness, at least in its first dictionary meaning of “vernünftig” or “raisonnable” in the meaning of “équitable”.²³

¹⁹ To the intellectual discomfort of some authors. See, critically e.g. Freund, G. K. *Look Up in the Sky, it's a Bird, it's a Plane ... it's Reasonableness*. 20 Sw. U. L. Rev. 195 (1991)

²⁰ “The right of the people to be secure in their persons, houses, papers, and effects, **against unreasonable searches and seizures**, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” [highlighted by the author]

²¹ 389 U. S. 347 (1967)

²² *Ibid.*, p. 361.

²³ The standard dictionaries translate the word „reasonable“ into German as (i) *vernünftig* (ii) *angemessen* (iii) *mässig* – see e.g. LANGENSCHIEDTS GROSSWÖRTERBUCH DER ENGLISCHEN UND DEUTSCHEN SPRACHE. Berlin: Langenscheidt, 1989, p. 1714 or PONS COLLINS GROSSWÖRTERBUCH. Stuttgart: Ernst Klett Verlag, 1999. The most frequent French translations refer to (i) *just*, *équitable* (ii) *raisonnable (pas excessif, modéré)* (iii) *raisonnable (démontré de la raison)* – see e.g. THE OXFORD – HACHETTE FRENCH DICTIONNARY. 2nd Ed. Oxford: OUP, 1997, p. 1617 or the COLLINS ROBERT FRENCH DICTIONARY. Glasgow: HarperCollins Publishers, 1987, p. 562.

There is one notable exception: the issue of the length of proceedings under Art. 6 (1) of the Convention for Protection of the Fundamental Rights and Basic Freedoms. This provision, which requires, *inter alia*, that “*everyone is entitled to a fair and public hearing within a reasonable time*”, exports and “Euro-notion” of reasonable period of time (*un délai raisonnable; eine angemessene Frist*) into all the legal systems of the signatory parties to the European Convention.²⁴ This importation of reasonableness as far as the notion of time and the length of proceedings are concerned are nothing new in the signatory states of the European Convention; their domestic legal orders generally do provide, either directly in the constitutional law or the codes of procedure, a general requirement that judicial review or administrative decision-making must be concluded within reasonable, in the meaning of adequate (“*angemessen*”) period of time.

However, a different situation is the use of reasonableness as *a general standard* for judicial review of administrative action in the civilian legal tradition. In the countries of German or “German-Austrian”, legal tradition, to which I would also count Central European countries, such as the Czech Republic and Slovakia, the approach of administrative courts to functionally similar situations, i.e. to determining the scope of the competence and, within that scope, to the discretion exercised by the administrative authority, would be different.

Germany

In Germany itself, as far as the first use of reasonableness scenario is concerned, to demarcate the scope of the power of the administrative authority by the reference to “reasonableness” would be hardly imaginable in a legal system strictly bound by the law. Article 20 s. 3 of the German Basic Law provides that all the three branches of the government are bound by law and statutes (“*an Gesetz und Recht gebunden*”). The strict binding of the public administration by law is an extension of the principle of the rule of law (“*Rechtsstaat*”). The two out of many limitations flowing from this principle for the activity of public administration are that, firstly, public administration can become active and take any decision only if it has express empowerment to do so in the law itself. The competence as well as its scope must be laid down by law; otherwise, the public authority must not act.²⁵ Secondly, the proportionality of the law itself as well as the proportionality of the application of it is also an extension of the state of the rule of law.²⁶

A different approach would also be present in the area of review of administrative discretion. The German legal theory would have first to agree whether there actually can be, in a

²⁴ The real content of the notion, however, appears to be far from clear; the European Court of Human Rights limits itself normally to stating that “[...] the “reasonableness” of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute“. See, e. g. *Comingersoll S.A. v. Portugal* [GC], no. 35382/97, § 19, ECHR 2000-IV or *Frydlender c. France* [GC], no 30979/96, § 43, ECHR 2000-VII. Such contextual study results into “reasonable” meaning anything between 3 years (*Bunkate v. the Netherlands*, series B, no. 248) and 9 years (*Van Pelt c. France*, decision of 23. 5. 2000 (Sect. 3), case no 31070/96, unpublished).

²⁵ K. Stern refers to this principle as „*positive Gesetzmässigkeit der Verwaltung*“ – In: Stern, K. DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND. BAND I: GRUNDBEGRIFFE UND GRUNDLAGEN DES STAATSRECHT, STRUKTURPRINZIPIEN DER VERFASSUNG. München: C. H. Becks’sche Verlagsbuchhandlung, 1977, p. 635; see also Schmidt-Bleibtreu, B., Klein, F. (eds.) KOMMENTAR ZUM GRUNDGESETZ. 10th Ed. Neuwied/Berlin: Luchterland, 2004, p. 692 and f. or Denninger, E., Ridder, H., Simon, H, Stein, E. (eds.) KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND. BAND 1. ART. 1 – 20. Neuwied/Berlin: Luchterland, 1984, p. 1375.

²⁶ See, e.g., Schmidt-Bleibtreu, B., Klein, F. (eds.), precited, at p. 687 and f. and the abundant literature and case-law cited therein.

democratic state based on the rule of law, anything as “free” administrative discretion at all. If the courts were to recognise that there actually is anything as free discretion, they would be anxious to limit it as much as possible.²⁷ The German Federal Constitutional Tribunal (*Bundesverfassungsgericht*) has stated on many occasions that in German law, there is nothing as entirely “free” discretion.²⁸ The administrative authority is always bound by the law, be it by the respective delegating provision or by the overall legal order and its guiding principles.

In the German doctrine and case-law, the review of the scope of administrative discretion would fall under two different headings: firstly, under the review of judicial discretion as such and, secondly, under the interpretation of undefined legal concepts (“*unbestimmte Rechtsbegriffe*”). Undefined legal concepts would contain notions like “public safety and order”, “public need”, “personal and professional aptitude” etc.²⁹ Should the public authority fail to interpret these concepts properly, the administrative court might annul the administrative decision on the basis of error in law, as the interpretation of these notions is a question of law. Even if, for instance, the administrative court would be convinced that the administrative interpretation of the say notion of “public need” would be completely unreasonable, it would quash the authority’s decision because it “erred in law”.

The standard for review of the discretion in administrative law as such is provided for in § 40 of the Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*³⁰) and § 114 of the Rules of Procedure for Administrative Courts (*Verwaltungsgerichtsordnung*³¹). These two provisions mirror each other. In terms of § 114 of the Rules of Procedure for Administrative Courts, “*Where the administrative is empowered to use discretion, the court will also examine whether the acts or omissions of the administration are not unlawful because the statutory limits of discretion have been exceeded or because discretion has been exercised in a manner not in conformity with the authority granted.*”

Here one finds again two aspects of reviewing discretionary administrative decisions: the scope and the existence of the competence proper and the manner in which it is exercised. The above-mentioned principles, inferred from the constitutional provisions of Art. 20 GG, have been developed by the doctrine and the case-law into a very elaborate and complex set of guidelines, which are to apply in areas of administrative discretion. They narrow if not altogether exclude the discretion of administrative authorities. The limits on the administrative discretion are contained, *inter alia*, in systematic limitations in the law itself, limitations flowing from other laws, limitations following from the constitutionally guaranteed rights and the constitution,³² limitation self-imposed by the administration itself,

²⁷ A good and concise introduction is provided by Schwarze, J. EUROPEAN ADMINISTRATIVE LAW. Revised 1st Ed., London: The Office for Official Publications of the European Union; Sweet & Maxwell, 2006, p. 270 – 279.

²⁸ „*Freies Ermessen*“ - see, e.g. BVerfGE 18, 353 (363) or BVerfGE 69, 161 (169).

²⁹ For ample examples of undefined legal concepts and their judicial interpretation in administrative law, see e.g. Stelkens, P., Bonk, H. J., Sachs, M. (eds.) VERWALTUNGSVERFAHRENGESETZ. 6th Ed., München: C. H. Beck, 2001, Rn 157 – 160.

³⁰ Latest consolidated version published on 21. 9. 1998 (BGBl. I S. 3050), last modified on 5. 5. 2004 (BGBl. I S. 718).

³¹ Latest consolidated version published on 21. 1. 1960 (BGBl. I S. 17), last modified on 21. 12. 2006 (BGBl. I S. 3316)

³² It serves to be mindful that under the German system, constitutional rights and fundamentals of the Basic Law are either to be applied directly by ordinary courts or they „radiate“ through the entire system of the „mere law“ (*einfaches Recht*) and oblige the ordinary judge to interpret the law in accordance with the constitution and the case-law of the Federal Constitutional Tribunal. This „intensity“ of the constitutional presence in all branches of

subjective public rights of individuals and, eventually, also the proportionality of the decision taken.³³ The key element is that, once reviewed and found perhaps “unreasonable”, the decision will be labelled as either an error in the interpretation of the law or “illegal”.

The Czech Republic

A similar approach to the review of administrative discretion can be found in the Czech legal system or in other Central European systems in the Austrian-Germanic legal tradition. In Czech law, for instance, the review of the competence of the administrative authority to act remains in the legality discourse: either there is a special empowerment of the administrative authority to act in a certain way or there is none. This rather strict distinction has its foundation in Art. 2 s. 2 of the Charter of Fundamental Rights and Basic Freedoms,³⁴ which reads: “*State authority may be exercised only in cases and within the bounds provided for by law and only in the manner prescribed by law.*”

The limitation in this provision is again twofold: firstly, the public administration can become active only if it has a special authorisation for its activity in the law and, secondly, it can only do so in a proportionate manner. The second limitation of the administrative activity should be read in conjunction with the provision of Art. 4 s. 4 of the Charter, which also provides for the minimalisation (proportionality) of any limitations of basic rights and freedoms.³⁵

Interestingly, an opposite provision as far as the freedom of action of individuals is concerned is provided for in Art. 2 s. 3 of the Charter: “*Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him by law*”. These two provisions are read in conjunction: public power and its exercise are always and strictly bound by law, whereas the actions of an individual are by default always free. The existence of these default principles led some of the leading Czech theoreticians to conclude³⁶ that in the Czech law, there is no “normatively” space free. In other words, any single legal action can be classified as being either allowed or prohibited, but the law, by virtue of these two general principles, which are by their nature able to cover seamlessly the entire normative space, is never indifferent.

There is no need to address this, perhaps somewhat artificial argument, in a greater detail. The crucial message is, however, quite clear: in a system based on such constitutional premises, the issue of whether or not it would be reasonable for an administrative authority to issue a decision or whether or not the authority could have seized or searched a person in given circumstance or whether such a person might have had a reasonable expectation of privacy, would never be posed. The judicial review runs, at least in its external formal appearance, along the lines of strictly attributed competence and the dichotomy of legal/illegal (or constitutional/unconstitutional).

law and especially in the area of administrative law might have given rise to a strand of German legal thought which considers administrative law nothing more than a set of rules executing or implementing the constitution.

³³ In great details see, Stelkens, P., Bonk, H. J., Sachs, M. (eds.), cit. above, n. 29, Rn 1- 259 or Schoch, F., Schmidt-Assmann, E., Pietzner, R. (eds.) VERWALTUNGSGERICHTSORDNUNG. 14th Ed., München: C. H. Beck, 2007, Rn 1 – 89.

³⁴ Constitutional Law no. 2/1992 Collection of Laws.

³⁵ “*In employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations are not to be misused for purposes other than those for which they were laid down.*” For the standard commentaries, cf. e.g. Klíma, K. (ed.) KOMENTÁŘ K ÚSTAVĚ A LISTINĚ [COMMENTARY ON THE CONSTITUTION AND THE CHARTER]. Plzeň: Aleš Čeněk, 2005.

³⁶ Most notably Knapp, V. TEORIE PRÁVA [THEORY OF LAW]. Praha: C. H. Beck, 1995, p. 17 – 18.

The review of the discretion itself and the manner in which it was exercised would, in the Czech system of judicial review, develop along similar lines to the German model. The Czech Supreme Administrative Court (*Nejvyšší správní soud*) has, for some time, struggled with the notion of free administrative discretion. Recently, the case-law heads in the direction of considerably limiting or even denying the existence of “free” area of administrative discretion; all decision-making of public administration must be reviewable in full jurisdiction and is limited.³⁷

Once made subject to the jurisdiction of administrative courts, the review of administrative discretion would of course involve some degree of the assessment of reasonableness and perhaps rationality. “Reasonableness” would, however, never form a formal or self standing standard for this review.³⁸ The word “reason” or “reasonableness” can be occasionally located in the case law of the administrative courts or the Constitutional Court (*Ústavní soud*) though, typically in three scenarios. Firstly, there is the presumption of a reasonable or rational legislator, which is employed in the field of statutory interpretation: where there are multiple possibilities of interpretation of a legal rule which enshrined the will of the legislator, the assumption is that the legislator’s intent was to regulate social relations in a reasonable and rational way.³⁹ Secondly, “reasonable and objective grounds for differentiation” appear as the possible justification for discriminatory treatment in the case law of the Constitutional Court.⁴⁰

Finally, there is yet another instance of the use of the term “reasonable” in the case law of the Constitutional Court, which may also explain why the notion as such is rarely used. In a landmark decision on the production regulation of milk, the Constitutional Court generally agreed that state regulation is possible. It went, however, on as to state that “*State intervention must observe a commensurate (fair) balance between the requirements of general public interest and the requirement of protection of an individual’s fundamental*

³⁷ The Court has recently started reviewing areas of law, which were traditionally believed to be the realm of „free discretion“ or „sovereign“ powers of the state, such as the award of citizenship – cf. Order of the Grand Chamber of the SAC of 23. 3. 2005, case no. 6 A 25/2002, published as no. 950/2006 of the Collection of Decisions of the SAC or judgment of 4. 5. 2006, 2 As 31/2005-78, unpublished, accessible online at www.nssoud.cz

³⁸ One sole and somewhat curious exception is the finding of the Constitutional Court (full court) of 22. 3. 2005, case no. Pl. ÚS 63/04, published as no. 210/2005 Collection of Laws, where the Constitutional Court, in a rather miscarried comparative exercise, actually mentions the *Wednesbury* test (without mentioning the case by name, just by a reference to English doctrinal literature). The „reasonableness“ criterion was, however, just mentioned in one line and never applied – the Court annulled the local by-law under review because of its illegality (the by-law introduced a new duty disregarding the fact that there is a constitutional guarantee that duties and taxes can only be imposed by a statute).

³⁹ See supra, point I. 2. In the case law of the administrative courts, see e. g. judgment of the Supreme Administrative Court of 13. 5. 2004, case no 1 As 9/2003, published as no 360/2004 Coll. SAC; judgment of the Supreme Administrative Court of 4. 8. 2005, case no 2 Aps 3/2004, no 720/2005 Coll. SAC; judgment of the Supreme Administrative Court of 24. 10. 2007, case no 2 Ao 2/2007, www.nssoud.cz.

⁴⁰ See e. g. finding of the Constitutional Court (full court) of 10. 3. 1999, case no Pl. ÚS 25/98, published as no 57/1999 Coll.; finding of the Constitutional Court (full court) of 26. 4. 2006, case no Pl. ÚS 37/04, no 419/2006 Coll. Further see Šotková, A. *Rovnost a zákaz diskriminace v judikatuře Ústavního soudu ČR [Equality and the Prohibition on Discrimination in the Case law of the Czech Constitutional Court]* In: Bobek, M., Boučková, P., Kühn, Z. (eds.), *ROVNOST A DISKRIMINACE [EQUALITY AND DISCRIMINATION]*. Prague: C. H. Beck, 2007, p. 187 et seq.

*rights. This means that there must be a reasonable (justified) proportionality relationship between the means used and the aims pursued.*⁴¹

The highlighted part of the text may offer some hints as to why the notion of “reasonableness” is very rarely used: the Czech Constitutional Court imported, about a decade ago,⁴² one of the best German export articles: the proportionality test. After the establishment of the Supreme Administrative Court,⁴³ the proportionality analysis was taken over in its case law as well. The proportionality analysis together with the prohibition on misuse of powers now create the two substantive points of review once it is established that the authority was competent to act, that it remained within its competence and that the procedure in issuing the act was correct.⁴⁴ As the quote from the decision of the Constitutional Court illustrates, in the view of the Court, proportionality and reasonableness are considered to be very close to each other, if not even equivalents.

France

French administrative law, albeit it has never articulated any overreaching theory of administrative discretionary power,⁴⁵ has established a complex system of judicial review of administrative action. The standard of review is to a large extent dependent on the respective type of review and action (*voies de recours*).⁴⁶ The existence of administrative competence and the manner in which the discretion within that competence was exercised will most typically be reviewed following an action for the excess of power (*recours pour excès du pouvoir*). Within this type of action, the administrative act will be reviewed on the grounds put forward by the applicant, such as illegality in relation to the object, illegality in relation to the motifs, the observance of the general principles of law and the absence of misuse of powers.

The French doctrine recognises, at least in theory, areas of free discretion of the administration.⁴⁷ This does not mean that the administration would be entirely free within these areas; the overreaching and binding principle is one of the legality of the public administration. It rather means that the control exercised by the administrative courts will be less detailed. The standard of review for these areas of administrative activity is the manifest

⁴¹ Finding of the Constitutional Court (full court) of 16. 10. 2001, case no. Pl. ÚS 5/01, no. 410/2001 Coll., English translation available at http://angl.concourt.cz/angl_verze/doc/p-5-01.php [highlighted by the author].

⁴² The proportionality analysis first appeared in the decisions of the Constitutional Court in mid-1990ies, for example in the finding of 30. 6. 1995, case no. Pl. ÚS 4/95, published in the Collection of Findings and Orders of the Constitutional Court, vol. 3, no. 29. p. 209; plenary opinion of 21. 4. 1996, case no. Pl. ÚS-st 1/96, Coll. vol. 9, p. 471; finding of 4. 2. 1997, case no. Pl. ÚS 21/96, Coll., vol. 7, no. 13, p. 87.

⁴³ As from 1 January 2003 by the zák. č. 150/2002 Sb., soudní řád správní [law no. 150/2002 Coll., Code of Administrative Justice].

⁴⁴ See, e. g. judgment of 27. 9. 2005, case no. 1 Ao 1/2005, no. 740/2006 Coll. SAC; judgment of 18. 7. 2006, case no. 1 Ao 1/2006, no. 968/2006 Coll. SAC, which concerned a situation comparable to the *Wednesbury* case – the issue of measures of general application (“by-laws”) by administrative authorities.

⁴⁵ Schwarze, J. EUROPEAN ADMINISTRATIVE LAW. Revised 1st Ed., London: The Office for Official Publications of the European Union; Sweet & Maxwell, 2006, p. 263.

⁴⁶ For a basic classification, see, e. g. Gohin, O. CONTENTIEUX ADMINISTRATIF. 4th Ed. Paris: Lexis Nexis SA, 2005, p. 175 and f. or Chapus, R. DROIT DU CONTENTIEUX ADMINISTRATIF. 10th Ed. Paris: Montchrestien, 2002, p. 185 and f.

⁴⁷ „*Pouvoir discrétionnaire*“, as opposed to „*pouvoir lié*“. There is, however, a similar debate to the German one: whether the fact that even in areas of “free” discretion the decision can be reviewed, albeit on limited grounds, by the *Conseil d’Etat*, does not render the notions somewhat hollow. See e. g. Braibant, G., Stirn, B. LE DROIT ADMINISTRATIF FRANÇAIS. 7e ed. Paris: Presses de Sciences Po et Dalloz, 2005, p. 282 and f. or de Laubadère, A., Venezia, J.-C., Gaudemet, Y. TRAITÉ DE DROIT ADMINISTRATIF. Tome I., 13e éd. Paris: L. G. D. J., 1994, p. 600 and f.

error of assessment (*erreur manifeste d'appréciation*). Manifest error of appreciation would be closest the French law might be approaching the reasonableness standard: the administration can err in law and its interpretation, but it is not entitled to make absurd decisions.⁴⁸

Synopsis

Albeit “reasonableness” and common sense considerations will, in practical terms, be present also in German, Czech or French review of administrative action, it never is an openly acknowledged and self-standing yardstick for judicial review. The formal judicial discourse as far as the existence of the competence and the manner in which it is exercised will always be one of legality, potential excess of powers and their misuse and, within the Germanic legal cultures, one of proportionality. This is not to say that the word “reasonableness” or “rationality” may not occasionally appear in the reasoning of these administrative courts. If it does, however, it only appears as a supportive argument or sometimes perhaps an argument of last resort.

III. EXPLAINING THE DIFFERENCE – POST-DICTATORIAL VS. EVOLUTIONARY EXPERIENCE

Why have the various “reasonableness” tests formed a key element in the Anglo-American judicial tradition and, at the same time, their role is limited in the here sketched continental systems? It is submitted that the answer may be found in the history and evolution of each of the systems of judicial review of administrative authority. The difference is best highlighted if we contrast the English and the Germanic tradition of judicial review.

In England and in other common law countries, the evolution of the system of judicial review was gradual and spread over long time. As A. Wharman notes, the administrative review in the Victorian period and before was mostly exercised vis-à-vis bodies acting under a charter or existing by immemorial user.⁴⁹ The courts could thus not apply any doctrine of legality or *ultra vires*, because competences of the administrative or local authorities were nowhere laid down by a statute. Absent any express provisions what the competences of the bodies under review were, the only possibility in which courts could review the ever growing amount of delegated legislation and administrative decisions was by appeal to the “common reason”, i.e. common understanding what might be proper exercise of power and what might be not. In these systems, community “reasonableness” provided the external authority and grounding for the review.

The German or Czech traditions are, on the other hand, different. One may call it the “post-dictatorial” approach towards the public administration and the judicial review thereof. The characteristic element is distrust towards the public administration and its strict binding to the letters of the law. The above-described constitutional principles of the strictly legally limited administration provide a completely different starting point for the review of the administrative action. In the reaction to the dictatorial experience in both countries and the activities of state bodies which were beyond and often even in breach of the law, there is, at least in the constitutional theory, no normatively-free space. Administration can only act if it is able to demonstrate that it possesses express statutory empowerment in this respect. The question of administrative action is thus exclusively a question of legality, not reason or propriety.

Within the manner in which the discretion itself is exercised, the “reasonableness” review is effectuated on the basis of checking the motifs for a decision and its proportionality. If motifs

⁴⁸ Schwarze, J., cit. above, n. 45, p. 267.

⁴⁹ Wharman, A. *Judicial Control of Delegated Legislation* 36 Mod. L. Rev. 615 (1973), p. 615.

are incorrect, i.e. the authority acted in breach of the first and the second of the *Wednesbury* prongs of the test, there is the misuse of power. The rest of the functional equivalence of the possible “unreasonableness” is covered by the proportionality analysis, especially if it is taken as a three-step test in its potential fullness.⁵⁰

Where does this leave the public reason and the reasonableness? As the sketchy functional comparison effectuated here demonstrates, it would be incorrect to consider the debate on reasonableness in the judicial forum as being an exclusively Anglo-American matter with no parallel in the continental legal systems. Functionally same purpose as the review of reasonableness in say English or American law, i. e. the limitation of the administrative discretion, is achieved via the combination of legality of the activity of public administration and the proportionality of its actions. The same consideration may not always be labelled in the same way; they are, however, functional equivalents.

In practical terms, reasonableness will most commonly overlap with the review of proportionality: only administrative activity, which is narrowly tailored and respects the peculiarities of the individual case, is reasonable and vice versa. The difference between the both systems would be, however, as to where the public reason is to crystallize. In the civilian legality/illegality discourse, the preference for the distillation of the public reason, as to what the administration is reasonably allowed to do, is given to the legislative forum. The administrative courts are only there to interpret the legislative will, with, however, one strong safeguard: the existence of constitutional review. In the Anglo-American word, the preference has traditionally been given to the case-by-case basis development of the public reason: the broadly framed legal or constitutional categories are to be interpreted (or themselves created) in the judicial forum.⁵¹

On a concluding note, it remains to be seen how and in what form the reasonableness test will survive in its country of origin. With the amount of legislation being annually passed in the United Kingdom, the original purpose of the reasonableness test is diminishing. The powers of public authorities are being put into clear statutory limits, custom and immemorial users as good as disappeared. This development, together with the strong impact of the both systems of European law⁵² and the principles enshrined in the 1998 Human Rights Act, make the discerning of public reason in the judicial forum somewhat difficult and perhaps not necessary. The assignment of competence became the question of *intra* or *ultra vires*, the motifs is the question of the misuse of powers and the proportionality analysis, which is

⁵⁰ For a theoretical introduction into the balancing and proportionality discourse, see e. g. Alexy, R. *On the Structure of Legal Principles*. Ratio Juris, vol. 3, issue 3, p. 294 (2000) or Alexy, R. *Constitutional Rights, Balancing, and Rationality*. Ratio Juris, vol. 16, issue 2, p. 131 (2003). A comparative overview of the application of the principle in administrative law offers Gerapetritis, G. *PROPORTIONALITY IN ADMINISTRATIVE LAW: JUDICIAL REVIEW IN FRANCE, GREECE, ENGLAND AND IN THE EUROPEAN COMMUNITY*. Athens: Sakkoula, 1997.

⁵¹ Yet another explanation for the difference in the approach between the Anglo-American and the Continental traditions is offered by G. P. Fletcher. In his view, the prominence of “reasonableness” in the Anglo-American legal thinking is an evidence of pluralism in legal thought. “*There are many reasonable answers to any problem. The common law does not insist upon the right answer at all times but only a reasonable or acceptable approach to the problem.*” In: Fletcher, G. P. *Comparative Law as a Subversive Discipline*. American Journal of Comparative Law, vol. 46, p. 683 (1998), at p. 699.

⁵² I.e. the law of the European Communities/European Union and the law (especially case-law) of the European Convention on Human Rights and Basic Freedoms.

doomed to be sooner or later be imported also into purely domestic cases,⁵³ will take care of the rest.

What of the old *Wednesbury* then? Some may call it, out of historical sentiment perhaps, a residual test of judicial review. Others may argue that the criteria themselves are in substance preserved, they were just incorporated into the newly emerging proportionality analysis. If the latter explanation were to be true, it would support the central claim of this contribution: reasonableness in the narrow sense and proportionality are, to a great extent, functional equivalents and it does not matter that much under which label one puts the substantively same set of considerations for the review of administrative discretion.

⁵³ It can be said that the classical European spill-over effect has already begun – cf. e. g. *Brind and others v Secretary of State for the Home Department* [1991] 1 AC 696, where their lordships were not entirely clear whether the principle of proportionality was a part of English administrative law, but some (cf. e.g. the speech by Lord Lowry) were ready to recognise it as such. From more recent case law, cf. e. g. *In R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 and *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840. The abandoning of reasonableness in favour of the proportionality analysis is advocated by Gale, W. S. *Unreasonableness and Proportionality: Recent Developments in Judicial Review*. Scots Law Times, vol. 4, p. 23-26 (2005). See also Clayton, R. *Regaining a Sense of Proportion: The Human Rights Act and the Proportionality*. European Human Rights Law Review, vol. 5, p. 504-525 (2001).